No. 7765

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of Windsor Square Development, Inc., a corporation, *Bankrupt*,

George E. Lilley, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, *Bankrupt*,

vs.

Margaret B. Barringer; Phoenix Title and Trust Company, a corporation; Salt River Valley Water Users' Association, a corporation; Central Arizona Light & Power Company, a corporation; County of Maricopa; State of Arizona; John D. Calhoun, County Treasurer of the County of Maricopa, State of Arizona; Mitt Sims, Treasurer of the State of Arizona; W. R. Wells; Raymond L. Nier; J. Allen Wells; E. L. Grose; Glen E. Weaver; E. R. Foutz; Lucille Nichols; Nellie B. Wilkinson and Susie M. Wallace, and Thomas J. Tunney (alleged Lien-Holders).

MOTION OF APPELLEE E. L. GROSE TO DISMISS APPEAL, OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, AND BRIEF AND ARGUMENT THEREON AND MOTION TO STRIKE STATEMENT OF THE EVIDENCE FROM THE RECORD HEREIN AND BRIEF AND ARGUMENT THEREON.

Cunningham & Carson,
Attorneys for Appellee
E. L. Grose.

THE MANUFACTURING STATIONERS INC., PHOENIX, ARIZONA

TOPICAL INDEX

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MOTION OF APPELLEE E. L. GROSE TO DISMISS APPEAL, OR IN THE ALTERNATIVE TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

Comes now E. L. GROSE, appellee herein, by Cunningham and Carson, his attorneys, and for himself alone, moves this Court to dismiss with costs the appeal herein taken to this Court by Margaret B. Barringer and Phoenix

Title & Trust Company, as Trustee, upon the following grounds:

That this Court is without jurisdiction, in so far as appellee E. L. Grose is concerned, to hear and determine the appeal herein attempted to be prosecuted by Margaret B. Barringer and Phoenix Title & Trust Company, a corporation, for the reason that the District Court on the 13th day of December, 1934, made and entered its order affirming and approving the referee's order establishing the rights of this appellee, of which complaint is made by appellants, which order was a final order and exhausted the jurisdiction of the District Court in the premises; that no steps to perfect an appeal were made herein until the petition for appeal was filed in the District Court on the 5th day of February, 1935, more than thirty days after the entry of the order of December 13th approving the referee's order.

That the decree of the referee in bankruptcy fixing and marshalling liens was filed on September 27th, 1932. Thereafter upon petition for review, the District Court entered its order on December 13, 1934 (T. of R. page 412) approving and affirming the said decree of the referee.

That thereafter on December 17, 1934 (T. of R. page 413), without notice to this appellee, an order was entered in said District Court vacating the said order of approval and that thereafter on the 7th day of January, 1935, the Court again entered its order approving and affirming the order of the referee (T. of R. page 414) and

filed a memorandum thereof (T. of R. page 110). That all of the proceedings in connection with said orders, subsequent to that of December 13, 1934, were without notice to this appellee, E. L. Grose. That the appellants did thereafter serve a citation and notice of appeal upon this appellee, but they did not take the necessary steps to properly make this appellee a party to the appeal to this Court, for the reason that said appellants failed to serve upon this appellee any proposed statement of evidence and failed to give any notice to this appellee of the hearing to approve the statement of the evidence, and failed to give to this appellee any notice of the final settling of the evidence in this cause.

WHEREFORE, this appellee, E. L. Grose, prays that this Honorable Court dismiss the appeal filed by Margaret B. Barringer and Phoenix Title & Trust Company, a corporation, appellants, in so far as this appellee is concerned.

Cunningham & Carson,

Glen S. Cunningham,

Attorneys for Appellee
E. L. Grose.

MOTION TO AFFIRM

And in the alternative, the said appellee E. L. Grose moves this Court to affirm the said judgment and decree entered by the District Court of the United States, for the District of Arizona, confirming and approving the decree of the referee originally entered on December 13, 1934, purportedly vacated on December 17, 1934, and purportedly re-entered on January 7, 1935, in so far as the same affects the rights of this appellee, with costs to this appellee, on the ground that it is manifest that no timely appeal and no proper appeal from said order has been taken by the appellants Margaret B. Barringer and Phoenix Title & Trust Company, a corporation, against this appellee, E. L. Grose, neither on its petition to review to the United States District Court, nor upon its appeal to this court.

Cunningham & Carson,

Glen S. Cunningham,

Attorneys for Appellee
E. L. Grose.

STATE OF ARIZONA,)ss.
County of Maricopa)

GENE S. CUNNINGHAM, being duly sworn, deposes and says: That I am one of the attorneys for E. L. Grose,

appellee on whose behalf the foregoing motion to dismiss and motion to affirm are made. That I have read the foregoing motion to dismiss and the foregoing motion to affirm and know the contents thereof, and that the statements contained therein are true according to the best of my knowledge, information and belief.

Glen S. Cunningham,

Subscribed and sworn to before me this 23 day of April, 1937.

Arthur T. LaPrade

(SEAL) Notary Public in and for
My commission expires Maricopa County, Arizona.

1-26-40

STATEMENT OF FACTS RELATING TO MOTION TO DISMISS APPEAL AND MOTION TO AFFIRM JUDGMENT

On the 28th day of October, 1930, the Windsor Square Development, Inc., a corporation, was adjudged bankrupt.

On June 8, 1931, the trustee filed a petition before the referee, to whom the matter had been properly referred, to fix and marshal liens and thereafter this appellee on September 2, 1931, filed his appearance and answer before the referee (T. of R. page 224).

That in due time the referee held hearings upon said petition and of answers theretofore filed, including the answer of this appellee, and made and entered his decree on the 17th day of September, 1932 (T. of R. page 231) in which decree the referee found (T. of R. page 241) that appellee E. L. Grose and Maude M. Grose, his wife, were entitled to a conveyance of Lot 1, Block 4 and Lot 2 Block 4 of Windsor Square without any further payment, and ordered, adjudged and decreed (T. of R. page 250) as follows:

> "E. L. Grose and Maude M. Grose, his wife, having made full payment for Lot 1, Block 4 and for Lot 2, Block 4 of Windsor Square, being a portion of the property described in the petition of the trustee of bankrupt herein and rights in said lots are recognized and the trustee in bankruptcy is directed to convey title to said lots to said E. L. Grose and Maude M. Grose, his wife, under the order of sale, heretofore made herein, subject to the liens and rights hereinabove determined."

That thereafter appellants herein filed their petition for review by the District Court of the said decree.

That the said District Court made and entered its order on December 13, 1934, approving and affirming the said referee's decree.

That thereafter without notice to this appellee, the Court on December 17, 1934, made and entered its order purporting to vacate the said order of December 13, 1934,

for the purpose of allowing appellants herein to file further authorities; that this appellee had no notice of any application for vacation of said order of December 13, 1934, and was not heard thereon.

That thereafter the District Court on January 7, 1935, made and entered its order again approving and affirming the order of the referee that appellee had no notice of the said orders of December 17, 1934, and January 7, 1935, or of any proceedings in connection therewith.

That the first step taken by appellants to appeal the matter to this Court was taken on February 5, 1935, when their petition for appeal was filed.

That thereafter appellants served a citation upon this appellee, but did not serve upon this appellee any proposed statement of evidence or any notice of the settling thereof, and that all steps and matters taken in connection therewith were taken without notice to this appellee.

While the appellants served citation on appellee E. L. Grose, they served no copies of the transcript of record upon said appellee, and no copies of the brief upon said appellee. However, appellee's attorneys have secured a copy of appellants' brief and in it no assignment as to the finding in favor of E. L. Grose is argued and no relief against E. L. Grose, appellee, is sought. On this account also the appeal as to appellee E. L. Grose should be dismissed and the judgment as to him should be affirmed.

BRIEF OF THE ARGUMENT

An appeal must be taken within thirty days after the judgment appealed from has been rendered.

Title 11, Section 48, United States Code.

There being no terms in bankruptcy matters, the only way an order in bankruptcy may properly be reconsidered or re-opened in a District Court is on a petition for rehearing.

Equity Rule 69;

Rule 37, *of Rules of Practice of the United States, District Court for the District of Arizona.*

No petition for a rehearing having been filed, the Court was without jurisdiction to vacate its order of December 13, 1934, therefore, the time for an appeal runs from that date.

An appeal not taken in time will be dismissed.

Credit Co. Limited v. Arkansas Cent. Ry. Co., 128 U. S. 258.

It is essential to an appellate jurisdiction that all parties interested be properly before the Appellate Court.

Hartford Accident & Indemnity Company v. O. L. Bunn, 285 U. S. 169; 76 L. Ed. 685;

Sharp v. Haney, 78 Fed (2d) 195;

McLean v. Jaffray, et al, 71 Fed. (2d) 743;

Partridge v. Clarkson, et al, 72 Fed. (2d) 108;

Bonner v. Cannon, 60 Fed. (2d) 228;

Taylor v. Leesnitzer, 220 U. S. 90; 55 L. Ed. 382;

Canal Bank & Trust Co. v. Brewer, 18 Fed. (2d) 93.

It is requisite that a copy of the proposed statement of the evidence and a notice of settling the same be served upon all adverse parties.

Equity Rule 75;

Rule 10 *of Rules of Practice of the United States District Court for the District of Arizona.*

ARGUMENT

The motion to dismiss should be granted for the reason that the appeal was not taken in time.

There being no terms of Court in bankruptcy, an order when made is final and can properly be vacated or set aside in equitable controversy arising in bankruptcy only upon a proper petition for rehearing and after notice to all parties interested.

As appears from the record in this case, no petition for rehearing was filed and no notice was given to this appellee of the presumably oral motion to vacate the order of December 13, 1934; presumably because there does not appear to be in the record any written motion, therefore, the Court was without jurisdiction to enter the order of December 17, 1934, vacating its order of December 13, 1934. It follows, therefore, that the time within which an appeal could be taken must be calculated from December

13, 1934, and an appeal to be effective must have been taken within thirty days thereafter.

It appears from the record that no action was taken toward an appeal until the petition for an appeal was filed on February 5, 1935, more than thirty days after December 13, 1934, and it therefore follows that the appeal was not taken within the time provided and that this Court has no jurisdiction.

The record shows that no copy of the proposed statement of evidence and no notice of the date of hearing or settling of such evidence was ever given to this appellee and that this appellee took no part therein. In such case this appellee is not properly before this Court upon any matters contained in or necessitating an examination of the statement of evidence.

In case this Court should find that the appeal was taken within time, then by reason of the failure of appellants to serve any proposed statement of evidence, or notice thereof upon appellee, such evidence cannot properly be considered upon this appeal as against this appellee and the judgment should be affirmed.

Cunningham & Carson

CUNNINGHAM & CARSON,

Gene S. Cunningham

GENE S. CUNNINGHAM,

Attorneys for Appellee
E. L. GROSE.

MOTION TO STRIKE STATEMENT OF THE EVIDENCE FROM THE RECORD HERIN

Comes now E. L. Grose, appellee, and as to and for himself alone moves this Court to strike from the transcript of the record in the above entitled case the purported statement of evidence appearing therein, upon the following grounds:

That the said purported statement of evidence was filed without any notice to this appellee and that no notice of any hearings thereon was given this appellee, nor was this appellee given an opportunity to be present when such statement of the evidence was settled and signed by the Judge of the United States District Court for the District of Arizona.

Cunningham & Carson

CUNNINGHAM & CARSON,

Gene S. Cunningham

GLEN S. CUNNINGHAM,

Attorneys for Appellee
E. L. GROSE.

STATE OF ARIZONA,)ss.
County of Maricopa)

GENE S. CUNNINGHAM being duly sworn, deposes and says: That I am one of the attorneys for E. L. Grose,

appellee on whose behalf the foregoing motin is made; that I have read the within motion to strike in the above entitled matter and know the contents thereof; that the statements contained therein are true according to the best of my knowledge, information and belief.

Glen S. Cunningham,

Subscribed and sworn to before me this 23 day of April, 1937.

(SEAL)

Arthur J. LaPrade
Notary Public in and for
Maricopa County, Arizona.

My commission expires
1-26-40

STATEMENT OF FACTS RELATING TO MOTION TO STRIKE STATEMENT OF THE EVIDENCE FROM THE RECORD IN THIS CASE

It appears from the record that on or about the 1st of May, 1936, a purported statement of evidence was filed in the United States District Court by counsel for appellants. No copy thereof was served upon this appellee and no notice of the lodging of said purported statement of evidence was given to this appellee, E. L. Grose, nor was there any notice given to this appellee of the date of the

hearing which was set for May 18, 1936. It appears that on May 18, 1936, the date for hearing was continued to May 25, 1936, and that no notice thereof was given to this appellee. It further appears that the evidence was settled by the Judge of the United States District Court on October 29, 1936, of which settling no notice was given to this appellee. This appellee received no notice whatsoever of any of the foregoing proceedings, or any other in connection with the statement of evidence and settling thereof and was not present nor represented by counsel at any of the times referred to.

BRIEF OF THE ARGUMENT

Rule 38 of the Rules of Practice of the United States District Court for the District of Arizona provides for settling of bill of exceptions and further provides, "preparation, allowance and approval of records on appeals and statements of evidence in equity cases are governed by equity rules 75, 76 and 77, promulgated by the Supreme Court of the United States".

Rules 75 and 76 provide specifically the manner in which the appellant shall proceed with the settling of the evidence to be included in a record on appeal to this Court. It provides that the testimony shall not be set out in full, but shall be stated in simple and condensed form. The duty of so condensing and stating the evidence shall rest

primarily upon the appellant who shall prepare a statement thereof and lodge the same in the Clerk's office for the examination of the other parties. It is appellant's duty also to notify the other parties, or their solicitors, of such lodgment and of the time and place when he will ask the Court or Judge to approve the statement, the time so named to be at least ten days after such notice to the parties.

These rules have been interpreted in a number of cases and where the appallant fails to prepare his statement of evidence or bill of exceptions in the manner provided by the rules, the same will not be considered by the Appellate Court.

Equity Rule 75;

Metzler v. United States, 64 Fed. (2d) 203, 209;

Zurich General Accident & Liability Ins. Co. v. Mid Continent Petroleum Corp., 43 Fed .(2d) 355;

Hard & Rand, Inc. v. Biston Coffee Co., 41 Fed. (2d) 625;

Wade, et al v. Leach, 2 Fed. (2d) 367.

ARGUMENT

No copy of the proposed statement of evidence and no notice of the filing thereof, and no notice of any step taken by appellants, or the Court in settling the evidence in this case having been served upon appellee, even though appellee had been served with a citation on appeal, the statement of evidence is not properly before this Court as against this appellee E. L. Grose, and as to him should be stricken and the judgment affirmed.

Respectfully submitted,

Cunningham & Carson

CUNNINGHAM & CARSON,

Glen S. Cunningham

GLEN S. CUNNINGHAM,

Attorneys for Appellee
E. L. GROSE.